Studies in International Investment Law
Studien zum Internationalen Investitionsrecht
43

Julian Scheu (Ed.)

Creation and Implementation of a Multilateral Investment Court

international investment law centre cologne

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Studies in International Investment Law
Studien zum Internationalen Investitionsrecht

Volume 43
and Volume 20 of the series
International Investment Law Centre Cologne (IILCC)

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Creation and Implementation of a Multilateral Investment Court

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Lisa Schöttmer

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facultas

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN: HB (Nomos) 978-3-8487-8386-1
ePDF (Nomos) 978-3-7489-2776-1

ISBN 978-3-7089-2285-0 (facultas Verlag, Wien)
ISBN 978-3-03891-473-0 (Dike Verlag, Zürich/St. Gallen)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-6436-9

Library of Congress Cataloging-in-Publication Data
Scheu, Julian
Creation and Implementation of a Multilateral Investment Court
Julian Scheu (Ed.)
331 pp.
Includes bibliographic references.

ISBN 978-1-5099-6436-9 (hardcover Hart)

1st Edition 2022

Foreword

Intensive discussions have been taking place over recent years on the future of the dispute settlement mechanism in international investment law. Whereas, on the one hand, advocates of the traditional system of international adjudication point to the undisputed success of ad hoc investment arbitration, advocates of substantial reforms favor a more permanent system such as the establishment of a Multilateral Investment Court (MIC).

This was the background against which a group of young lawyers involved with the International Investment Law Centre Cologne (IILCC) assembled and discussed the various alternatives and problems of an MIC, thereby taking stock of the current discussion held at UNCITRAL Working Group III.

Under the guidance of the institute's General Manager, Junior Professor Dr. Julian Scheu, the various aspects were discussed in detail before each of the participants laid down his and her ideas in writing. Many thanks are due to the IILCC staff members Lisa Schoettmer and Eva-Maria Wettstein who provided outstanding assistance in this process.

The result looks to me like a remarkable contribution to the current debate. Accordingly, the IILCC had no hesitation in incorporating this book into its publication series on international investment law.

Be the readers inspired and the book a welcome contribution to this ongoing debate!

Cologne, March 2022
Prof. Dr. Dr. h.c. Stephan Hobe
Executive Director
International Investment Law Centre Cologne

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Abbreviations

ACWL	Advisory Centre on World Trade Law
ACWLA	Agreement Establishing the Advisory Centre on WTO Law
ADR	Alternative Dispute Resolution
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
CAS	Court of Arbitration for Sport
CCIAG	Counsel International Arbitration Group
CETA	Comprehensive Economic and Trade Agreement
cf	*confer*
Charter	Charter of Fundamental Rights of the European Union
CIDS	Geneva Centre for International Dispute Settlement
CJEU	Court of Justice of the European Union
COP	Conference of the Parties
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
Doc(s)	Document(s)
DPA	Dispute Prevention and Avoidance
DPM	Dispute Prevention Mechanisms
DPP	Dispute Prevention Policies
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Convention of Human Rights
ECT	Energy Charter Treaty
ed(s)	editor(s)
edn	edition

EFILA	European Federation for Investment Law and Arbitration
eg	*exempli gratia*
et al	*et alia*
et seq(q)	*et sequentes/ et sequential*
etc	*et cetera*
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATT	General Agreement on Tariffs and Trade
IASB	International Accounting Standards Board
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
ibid	*ibidem*
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IDLO	International Development Law Organization
ie	*id est*
IIA	International Investment Agreement
IILCC	International Investment Law Centre Cologne
IIMS	International Investment Mediation Service
IPA	Investment Protection Agreements
ISDA	International Swaps and Derivatives Association
ISDS	Investor-State Dispute Settlement
ISP	Investment Support Programme
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-United States Claims Tribunal
JAC	Joint Administrative Commissions

KOTRA	Korea Trade-Investment Promotion Agency
LCIA	London Court of International Arbitration
LDC	Least Developed Countries
lit	*littera*
MAI	Multilateral Agreement on Investment
MFN	Most-favoured-nation
MIAM	Multilateral Investment Appeals Mechanism
MIC	Multilateral Investment Court
MIC Draft Statute	Draft Statute of the Multilateral Investment Court
MIDSI	Multilateral Institution for Dispute Settlement on Investment
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MRI	Multilateral Reform Instrument
n	Footnote
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
No	Number
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OIO	Office of the Foreign Investment Ombudsman
para(s)	paragraph(s)
PCA	Permanent Court of Arbitration
QMUL	Queen Mary University of London
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SME	Small and Medium Enterprises
SSDS	State-to-State Dispute Settlement
TEU	Treaty on European Union
TFA	Task Force Argentina
TFEU	Treaty on the Functioning of the European Union

TPF	Third-Party Funding
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNTS	United Nations Treaty Series
US	United States
USD	United States Dollar
v	*versus*
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Chapter 1: The Idea of a Multilateral Investment Court in the Rise, Crisis, and Reform of International Investment Law

by Julian Scheu[*]

International investment law is a well-established subfield of international economic law which is, at the same time, in a state of constant change.[1] Reasons for this dynamic may be found in the need to adapt the legal framework to global investment flows and, in particular, the fact that the very concept of investment protection remains disputed and therefore subject to policy shifts.[2]

International investment law can be distinguished from other fields of international economic law, and even plays, in view of the importance it attributes to private individuals and corporations, a particular role within the international legal order.[3] Its unknowingly fast development triggered questions about the legitimacy of investment protection, the power of arbitral tribunals and the regime's impact on national sovereignty. These

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1 Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (CUP 2011), 3; Marc Bungenberg et al, *General Introduction to International Investment Law* in Bungenberg et al (eds), *International Investment Law – A Handbook* (Beck/Hart/Nomos 2015), 1. See for an overview on latest developments: Stephan Hobe and Julian Scheu (eds), *Evolution, Evaluation and Future Developments in International Investment Law* (Nomos 2021).

2 Martins Paparinskis, *Basic Documents on International Investment Protection* (Bloomsbury Publishing 2019), 1. As Muthucumaraswamy Sornarajah observes, few areas of public international law excite as much controversy as international investment law. See Sornarajah, *The International Law on Foreign Investment* (CUP 2021), 1. Characterising investment law as a complex adaptive system: Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29.2 ICSID Review, 372-418.

3 Speaking of a 'quiet revolution' in international law: John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP 1999), 191; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016), 282.

phenomena have sometimes been described as excesses or growing pains,[4] and ultimately opened up the path towards meaningful negotiations about systemic reforms. In the current discussions, the idea of creating a Multilateral Investment Court (MIC) plays a central role. Already debated in 1960,[5] the establishment of a permanent arbitral body or a world investment court does not seem to have lost much of its conceptional appeal. However, the complexity of such an endeavour cannot be underestimated.

To adequately situate the MIC reform project within the legal framework first requires acknowledging that investment law is characterized by systemic features which are based on two separate building blocks (A.). It is also vital to recall the systemic concerns which led to the backlash against investment arbitration. These concerns are at the same time guiding principles and benchmark for a future MIC (B.). It is against this background that the chapters in the present volume evaluate and analyse the options, merits, pitfalls, and potential consequences of creating and implementing a Multilateral Investment Court (C.). Regardless of its concrete institutional form, multiple challenges lay ahead for such a permanent body created to position itself within the international investment law regime (D.).

A. Systemic Features of the International Investment Law Regime

Since its creation during the second half of the twentieth century,[6] contemporary investment law consists of two building blocks: substantive

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4 See, eg, David Schneiderman, 'Against Constitutional Excess: Tocquevillian Reflections on International Investment Law' (2018) 85.2 University of Chicago Law Review, 585-608; Silvia Constain, 'ISDS Growing Pains and Responsible Adulthood' in Kalicki and Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015), 344-350.

5 ILA, 'Juridical Aspects of Nationalization and Foreign Property' (1960) 49 International Law Association Reports of Conferences, 175 et seq.

6 Modern international investment law did not arise out of nowhere but can be traces back to the international law doctrine of State responsibility for injuries to aliens and earlier State practice of concluding treaties on Friendship, Commerce and Navigation. See, eg, Chester Brown, 'International Investment Agreements – History, Approaches, Schools' in Bungenberg et al (eds), *International Investment Law – A Handbook* (Beck/Hart/Nomos 2015), 153 et seq.; Wolfgang Alschner, 'Americanization of the bit universe: The influence of friendship, commerce and navigation (fcn) treaties on modern investment treaty law' (2013) 5.2 Goettingen Journal of International Law, 455-486; Muthucumaraswamy Sornarajah, 'The Cli-

investment protection standards and a procedural framework on investor-State dispute settlement (ISDS). In combination, both normative building blocks define the systemic features of today's international investment law regime.

I. Substantive Investment Protection

Substantive investment law is rooted in mostly bilateral international investment treaties (BITs) which have been concluded by the thousands since the 1960's.[7] Content and structure of the first BITs were influenced by academic discussions on multilateral draft conventions on investment protection such as the 1959 Abs-Shawcross Draft Convention on Investments Abroad.[8] Given that the international community of States could not agree on a common standard of protection in a multilateral treaty,[9]

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mate of International Arbitration' (1991) 8.2 Journal of International Arbitration 47, 180. See also from an historical perspective: Stephan Schill, Christian Tams, and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar Publishing 2018).

7 According to the UNCTAD Investment Agreements Navigator, 2258 BITs were worldwide in force as of November 2021, data available at <https://investmentpolicy.unctad.org/international-investment-agreements> 6 January 2022. See generally on the economic and policy motives for concluding BITs: Zachary Elkins, Andrew Guzman, and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2006) 60.4 International Organization, 811-846.

8 The draft was published in: 9.1 Journal of Public Law (presently Emory Law Journal) (1960), 115-118. Other influential multilateral draft conventions were the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), and the OECD Draft Convention on the Protection of Foreign Property (1962). At the time of their publication, these draft conventions were subject of heated academic discussions. See, eg, Arthur S Miller, 'Protection of Private Foreign Investment by Multilateral Convention' (1959) 53.2 The American Journal of International Law, 371-378; Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary' (1960) 9.1 Journal of Public Law, 147-171; Ignaz Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table' (1961) 10.1 Journal of Public Law, 100-112. See for an overview on multilateral approaches to investment protection: Brown (*n 6*), 14-59.

9 Pointing to the crucial role that the World Bank played in this process: Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018), 97-99.

these draft conventions became an inspiration for many capital-exporting countries to conclude such treaties on a bilateral basis.[10] With decades of experience in negotiating and drafting BITs, some States published their own benchmark agreement, also known as model BIT. These instruments became de facto guidelines for the negotiation of investment treaties,[11] so State practice led to standardised treaty texts.[12] In view of these aligned practices which were influenced by multilateral approaches, one could indeed speak of a factual multilateralisation of international investment law.[13] But despite general trends of regional and substantive convergence,[14] the normative basis of today's substantive investment protection is still based on thousands of individual treaties. The substantive building block therefore remains characterised by bilateralism and fragmentation.[15]

In addition, substantive investment protection consists to a large extent of open-worded legal concepts such as fair and equitable treatment or the protection against unlawful indirect expropriation.[16] The vagueness of substantive legal concepts undeniably poses a major challenge for tribunals

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10 Among the capital-exporting nations to first conclude bilateral investment treaties belong Germany (since 1958), Switzerland (since 1961), Netherlands (since 1963), France (since 1963), and Italy (since 1964).

11 Recalling that investment treaty negotiations are often driven by strategic foreign policy considerations: Lauge N. Skovgaard Poulsen, Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' (2016) 7.1 Journal of International Dispute Settlement, 72-91.

12 Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2010), 89-91.

13 Stephan W Schill, 'The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds' (2010) 2.1 Trade, Law and Development, 59. See for a critique of the multilateralisation argument: Aniruddha Rajput, 'The myth of a multilateral framework in international investment law' (2016) 56.3-4 Indian Journal of International Law, 427-461.

14 In this sense, arguing that mega-regional treaties such as CETA or RCEP provide a vehicle for future multilateral investment rules: Tania Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway towards Multilateral Rules' (2018) 17.1 World Trade Review, 33-63.

15 Recalling that the law 'largely consists of a collection of bilateral or plurilateral treaties with no systematic interconnectedness': Jörg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (CUP 2021), 3.

16 See, eg, addressing the dilemma of vagueness: Yves Fortier and Stephen Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) 19.2 ICSID Review, 293-327.

in applying the law to the facts of a specific case.[17] The reluctance of the contracting States to specify the meaning of their investment treaty amounts to a delegation of substantial decision-making powers to the tribunal. This leads to the question who interprets and applies the law and on which legitimate grounds is the exercise of such wide-reaching powers based.

II. Procedural Framework on Dispute Settlement

From the very beginning, substantive investment protection standards were combined with a procedural framework on ISDS as the regime's second building block. When the Abs-Shawcross Draft Convention on Investments Abroad was published in 1960, Hermann J. Abs and Lord Shawcross argued that

> [t]here must, at the heart of any instrument dedicated to the creation of an atmosphere of confidence, always lie a provision for the effective adjudication by an impartial body of all disputes which may arise. Undertakings without the machinery for determining their content and application cannot achieve the desired end.[18]

Accordingly, in its annex relating to the arbitral tribunal, the Abs-Shawcross Draft Convention on Investments Abroad provided for ad hoc investment arbitration.[19] Since 1968, investment treaties systematically contained ISDS provisions which grant foreign investors direct access to international arbitration in case of a dispute with the host State.[20] Ad hoc investment arbitration, where tribunals are constituted on a case-by-case basis, became the global standard.[21] Today, the system of investment arbitration is characterized by its efficiency and attractiveness for foreign investors. There are four main reasons which explain the success of invest-

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17 Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' in von Bogdandy and Wolfrum (eds) (2006) 10 Max Planck Yearbook of United Nations Law, 631.

18 Hermann J Abs and Lord Shawcross, 'Comment on the Draft Convention by its Authors' (1960) 9.1 Journal of Public Law [presently Emory Law Journal], 123.

19 'The Proposed Convention to Protect Private Foreign Investment' (1960) 9.1 Journal of Public Law [presently Emory Law Journal], 118.

20 The first bilateral investment treaty providing for modern ISDS was the Netherlands-Indonesia BIT (1968).

21 See for an analysis from a policy perspective: St John (*n 9*).

ment treaty arbitration: direct accessibility to an international forum (1.), participation in the constitution of the arbitral tribunal (2.), finality of the decision-making (3.), and enforceability of the award (4.).

1. Direct Accessibility to International Arbitration

First, the ISDS clauses contained in most investment treaties grant foreign investors direct access to international arbitration without having to exhaust local remedies before national courts of the host State.[22] This waiver speeds up the process of dispute resolution significantly since national court proceedings may require years, if not decades of litigation. Direct access to international arbitration is a unique feature which distinguishes ISDS from other international law fora where private parties have standing such as human rights courts.[23]

2. Participation in the Composition of the Arbitral Tribunal

Second, all main arbitration rules used in ISDS provide for the right of disputing parties to appoint a member of the arbitral tribunal.[24] Subject to its impartiality and independence, any individual appointed by a disputing party is in principle capable of serving as arbitrator.[25] In contrast to courts and tribunals where all adjudicators have been appointed by States, investors have an equally significant influence on the constitution of the arbitral tribunal. This active participation of the private party is based on

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22 No exhaust local remedies in ISDS (generally).

23 See, eg, Chittbaranjan F Amerasingbe, 'The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights' (1968) 28 Heidelberg Journal of International Law, 257-300; Cesare P R Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Boschiero et al (eds), *International Courts and the Development of International Law* (Springer 2013), 561-572.

24 Article 37 ICSID Convention, Article 9 UNCITRAL Arbitration Rules, Article 17 SCC Arbitration Rules.

25 Should reasonable doubts with respect the individual's impartiality or independence arise at any point in time, the arbitrator must step down. See for a detailed analysis of the process: Chiara Giorgetti, 'Selecting and Removing Arbitrators in International Investment Arbitration' (2018) 2 Brill Research Perspectives in International Investment Law and Arbitration <https://doi.org/10.1163/24055778-12340007> accessed 13 January 2022.